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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1245

JOHN A. GEDERS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JOHN A. GEDERS, by and through his undersigned attorney, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The panel opinion of the court of appeals (App. A, infra, is reported at 566 F.2d 1277, the en banc opinion of the court of appeals has not as yet been reported (App. B, infra).

JURISDICTION

The en banc judgment of the court of appeals was entered on December 11, 1978. The court of appeals denied Petitioner's Motion for Rehearing and Reconsideration on January 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting into evidence, over objection, statements made by the defendant to an Assistant United States Attorney and federal law enforcement officials that were a part of plea bargaining discussions.

2. Whether the trial court erred in denying defendant's Motion in Limine and permitting the government to cross-examine the defendant and present evidence on rebuttal regarding matters discussed between the defendant, the government prosecutor, and federal law enforcement officials after the defendant had been indicted, during the course of a meeting between the defendant, the government prosecutor and federal law enforcement officials, where the defendant was advised that no discussion had between them would in any way relate to the pending case or be used against him.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

a. Fifth Amendment, United States Constitution:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

b. Sixth Amendment, United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Federal Rules of Criminal Procedure, Rule 11(e)(6); Title 18, United States Code; Rule 410, Federal Rules of Evidence; Title 28, United States Code.

STATEMENT OF CASE

Petitioner, John A. Geders, after having his conviction for violation of Title 18 U.S.C., § 371; Title 21, U.S.C., §§ 952(a) and 960(b); and violation of Title 21, U.S.C., § 841(a)(1), as reflected by three (3) counts of a three (3) count Information, reversed by the United States Supreme Court, was then re-tried by a jury before the Honorable George C. Young, Chief Judge, United States District Court, Middle District of Florida, and he was once again found guilty of each count. Thereafter, the defendant was referred for a pre-sentence investigation, and on January 3, 1977 he was sentenced on Count I to a term of imprisonment for three (3) years, and a special parole term of three (3) years to follow said term of imprisonment in accordance with Title 21, U.S.C., § 841; and he was further sentenced to a term of three (3) years on Counts II and III, which sentences were to run concurrently with the sentence imposed on Count I. A timely Notice of Appeal was filed in behalf of petitioner to the United States Court of Appeals for the Fifth Circuit. The panel opinion reported at 566 F.2d 1277 reversed the defendant's conviction, but the court's en banc opinion reinstated and affirmed said conviction.

The following abbreviations will be used throughout this Petition:

"R" - Record on Appeal

"App." - Appendix to Brief

STATEMENT OF FACTS

The defendant was originally charged with four (4) counts of a five (5) count Indictment; he proceeded to trial and was convicted of three (3) of the four (4) counts, and his conviction was ultimately reversed by the United States Supreme Court. Geders v. U.S.A., 96 S.Ct. 1330 (1976). The defendant was re-tried on the three (3) remaining counts, which charged him with several offenses relating to violations of Title 21, U.S.C., § 952(a); Title 21, U.S.C., §§ 952(a) and 960(b), and a violation of Title 21, U.S.C., § 841(a)(1).

The case proceeded to trial before Honorable George C. Young, Chief Judge, Middle District of Florida, before a jury of twelve (12) persons, as a consequence of which trial the defendant was convicted of all counts charged and sentenced as heretofore set forth.

Prior to the time that the defendant testified in the trial, counsel made an oral motion in limine to limit the government's cross-examination of the defendant (R. 582-590, 593-600, 704, 705)(App. C 1-17), in that certain information was obtained from the defendnat, after indictment herein, as a result of an interview with an Assistant United States Attorney and federal investigators while he had counsel, and predicated upon an agreement and understanding between all parties present that there would be no inquiry made regarding the facts of this case and nothing said would be used against the defendant, since this

discussion was a part of plea bargaining negotiations. (R. 593-599, 726-728, 758, 764, 767-768)(App. D 1-14). The court determined that it would proceed to hear the direct examination of Mr. Geders, and prior to the time that he was cross-examined by the government, out of the presence of the jury, he would hear the testimony and legal argument that related to the motion in limine. The defendant testified that at the request of Lowell Miller, who was then a United States Customs Officer, after indictment and at a point in time while he was represented by counsel, he had a meeting at the United States Attorney's Office with Mr. Miller, certain other government investigators, and Oscar Blasingame, an Assistant United States Attorney. The defendant testified that Mr. Miller "told me he wanted to see me in his office in about a week without any attorney," and that pursuant to that discussion an arrangement was made for the meeting hereinabove described. Mr. Geders went to the meeting without counsel, although as previously indicated, he was represented by counsel at the time. The defendant was told before the meeting, and at the meeting by Mr. Blasingame, that nothing he said would be used against him. There is a dispute whether the defendant was otherwise advised of his rights. There was a discussion between the parties present about an unrelated criminal situation and, in addition thereto, there was a discussion about Pedro Alvarez and, specifically, the defendant was asked whether or not title to a Prosche automobile owned by Mr. Alvarez was placed in the defendant's name, which activities he acknowledged. There were other discussions about the defendant, Mr. Alvarez, and the defendant's employment at

the "Sound Room," and, lastly, he was asked whether he ever went to New York to convert large bills to small bills for Mr. Alvarez, all of which questions he fully responded to. At no time prior to the aforesaid sequence of events and meetings had the defendant ever discussed with any law enforcement officials his relationship with Mr. Alvarez, the fact that Mr. Alvarez had an automobile placed in his name, his employment at the "Sound Room," and his trips to New York for Mr. Alvarez to convert large bills to small bills. (R. 707-711)(App. E 1-5). On cross-examination by the Assistant United States Attorney trying the case, Mr. Geders more fully explained the circumstances under which he had his initial meeting with Mr. Miller that gave rise to the latter interview (R. 711-714)(App. F 1-4), and he further related that the initial discussion he had with Mr. Miller was a discussion where Mr. Miller was seeking information about other criminal situations which he felt the defendant could aid and assist him with, which the defendant was willing to do. (R. 717, 718)(App. G 1,2). The defendant further related that there was a discussion between himself and Mr. Miller that centered around the dropping of these charges against the defendant in exchange for him providing information about criminal activities of other persons and acting as a government informant. (R. 726-728)(App. H 1-3).

The Government called Mr. Blasingame, who had since left government employ and was a practicing attorney in Pinellas County, Florida. (R. 733, 734)(App. I 1,2). Mr. Blasingame testified that he was the Assistant United States Attorney who handled the presentation of the facts involving the defendant herein to a

Federal Grand Jury, which gave rise to the return of the indictment herein; and, thereafter, he became the attorney who prosecuted the several defendants who were charged. (R. 735)(App. J 1). Mr. Blasingame further testified that Mr. Miller said, ". . . that he had contact with Geders and that Geders said he would like to come in." (R. 737)(App. K 1). Thereafter, Mr. Geders met with Mr. Blasingame; Mr. Miller; Special Agent Gene Hill of the Internal Revenue Service, Intelligence Division; and Charles Hudson of the United States Treasury Department, Bureau of Alcohol, Tobacco Tax & Firearms. (R. 737, 738)(App. L 1,2). Mr. Blasingame related that he acted as "master of ceremonies" for the meeting, he stated that he gave Mr. Geders his "so-called Miranda rights," discussed the fact that he had counsel; but neither Mr. Geders nor any of the persons present were interested in having counsel aware of the meeting; and further made inquiry of Mr. Geders about Pedro Alvarez, who at that time was also represented by the same attorney who represented Mr. Geders, with a view in mind of finding out what information Mr. Geders could furnish to federal law enforcement officials. Mr. Blasingame said that no promises were made to Mr. Geders for the information he furnished, or that was to be furnished, since "this was just a preliminary meeting to find out what sort of things he could offer and what sort of investigation would go from there." (R. 738-740)(App. M 1-3). The court asked Mr. Blasingame whether there was any discussion about the pending case, any discussion about plea bargaining, leniency, etc., in response to which Mr. Blasingame said, "No, sir. No discussion other than we wouldn't discuss anything whatsoever to do with this case at all."

The following colloquy occurred between the court and the witness:

THE COURT: "Why would you think that Mr. Geders would come and talk to you?"

THE WITNESS: "Because of the amount of involvement he had with Pedro Alvarez and all the other activities."

THE COURT: "What would be the purpose if you weren't going to show him any kind of consideration for his talking to you -- what was in it for him to talk to you about? "

THE WITNESS: "He would be subject to all kind of indictments and prosecutions in the matters relating to Mr. Alvarez which were totally unrelated to this, your Honor."

THE COURT: "Well, was there some discussion then or impliedly or directly that there would be other charges dropped or not prosecuted or not brought?"

THE WITNESS: "Not to my recollection."

THE COURT: "What did you think as you sat there and talked to Mr. Geders, that he was thinking he would get for, in a sense, to use a colloquial expression, 'spilling the beans.'"

THE WITNESS: "I thought he would be helping in this Alvarez matter so as not to get indicted or tied up in any indictments of Pedro Alvarez."

THE COURT: "Well, did you represent to him that he was going to not be indicted then if he told you about Alvarez."

THE WITNESS: "No, sir."

THE COURT: "Well, did you make any representation to him that the information that he gave to you would not be used in this case in the prosecution of this case."

THE WITNESS: "No, sir. No, your Honor."

THE COURT: "Did anybody in your presence make such a representation?"

THE WITNESS: "No, your Honor. We didn't want to talk about this case in any way whatsoever."

THE COURT: "Why?"

THE WITNESS: "Because he was represented by an attorney in this case, and it had nothing whatsoever to do with Pedro Alvarez -- it was a completely different venture."

THE COURT: "Then you weren't planning then to use the information that you secured from him in that conversation in this case?"

THE WITNESS: "No, your Honor, we had no idea that we would get into this Pedro Alvarez business in the trial."

(R. 741,744)(App. N 1-4).

In my cross-examination of Mr. Blasingame, I asked him whether or not he did advise Mr. Geders and agree with him that there would be no discussion pertaining to the pending case, to which he stated: "Yes, sir." (R. 746, 747)(App. O 1,2).

Mr. Blasingame acknowledged that in connection with the first Geders' case he did not produce to his trial attorney as a part of the pre-trial discovery any statement, admission, or other advice given by Mr. Geders to Mr. Blasingame and the federal officials present at the meeting in question that was incriminatory of him, but he couldn't account for the reason why he failed to produce and provide that information to the defense attorney on that occasion. (R. 752)(App. P 1). The transcript of the first Geders' trial was presented to Mr. Blasingame to refresh his recollection as to a colloquy he had with Judge Ben Krentzman regarding this subject matter where this evidence was excluded, on which occasion he told Judge Krentzman that the reason why he had not produced these matters

pre-trial to Mr. Geders' attorney was because of the fact that at the meeting in question he avoided talking about the case in question whatsoever. (R. 753)(App. Q 1). Mr. Blasingame acknowledged that in the first Geders' case, when the question of the admissibility of these incriminatory statements were argued before Judge Krentzman, he said to the court that, "we have no constitutional question because the man specifically was not going to discuss this case at that time." (R. 755)(App. R 1).

The chief investigating agent for the United States of America, Lowell Miller, was called as a witness by the government to testify as to the circumstances under which the meeting in question took place and the discussion had between the parties. Mr. Miller testified of his practice with cooperating witnesses who have been indicted, and related that he would tell such cooperating witnesses that he could not make any promises, but he would bring the cooperation to the attention of the United States Attorney's Office, who would then determine whether that cooperation was to be presented to the court and given consideration at the time that the cooperating witness plead quilty to the pending charges against him and appeared before the court for sentencing. (R. 764, 765, 767) (App. S 1,2,3). Mr. Miller further related that he would discuss the effect of cooperation versus non-cooperation by a defendant as it related to the ultimate sentence to be received at the time of the disposition of the case pending against the defendant. Although Mr. Miller did not recall specifically what he told Mr. Geders before the meeting with Mr. Blasingame, he certainly confirmed the testimony of Mr. Geders regarding the

ultimate advice to the court of the nature and extent of Mr. Geder's cooperation insofar as the government's pending investigation of Pedro Alvarez for importation of marijuana and violation of the Internal Revenue Service laws. (R. 767-769)(App. T 1,2,3). Mr. Miller as asked, "well, what was your understanding of the reason for Mr. Geders cooperating about Alvarez -- why was he doing it?," to which he answered, "my understanding at that time were two reasons. He wanted to help himself in this case, and he would -- he had some kind of falling out with Mr. Alvarez and he was interested in getting Mr. Alvarez." (Emphasis added).

The court overruled the defendant's motions and permitted the government to inquire of the defendant as to his relationship with Mr. Alvarez and, particularly, the fact setting under which Mr. Alvarez' automobile was placed in Mr. Geders' name, Mr. Geders' employment at the "Sound Room" and Mr. Geders' travels to New York for Mr. Alvarez to convert large bills to small bills, although those matters were not testified to by the defendant during the course of his direct examination. (R. 782-784)(App. U 1,2,3).

Subsequently, as a part of the government's rebuttal case, over objection, Mr. Blasingame and Charles Hudson, who was employed by the United States Treasury Department, Bureau of Alcohol, Tobacco Tax & Firearms, were called in the presence of the jury to testify about the coversations they had with Mr. Geders at the United States Attorney's Office that is hereinabove described. (R. 1018-1024, 1037-1043)(App. V 1-14).

In cross-examination of the defendant regarding his taking money for Mr. Alvarez to New York to convert from large bills to small bills, the defendant testified that said transaction took place after November, 1972 and, as a matter of fact, took place in December, 1972. (R. 930-934)(App. W 1-5). And he further testified on cross-examination that Mr. Alvarez" Porsche automobile was placed in his name through inadvertence and because of the time of evening that he appeared at the dealer where the vehicle was to be picked up and for no other reason. (R. 905-930)(App. X 1-26).

REASONS FOR GRANTING THE WRIT

Rule 410 of the Federal Rules of Evidence and Rule 11(e)(6) provide in part as follows:

> "Statements made in connection with, or relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. . . ."

This Court, in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), in addressing itself to the subject matter of "plea bargaining," held as follows:

> "This Record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the work load of the often understaffed prosecutor's offices. The heavy work load may well explain these episodes, but it does not excuse them. The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge was subjected to a full-scale trial, the States and

> the Federal Government would need to multiply by many times the number of judges and court facilities.
>
> "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."

Nevertheless, the increasing complexities of our society, and particularly the criminal process and proceedings, and more importantly the en banc Opinion of the Fifth Circuit Court of Appeals from which review is sought, has raised substantial doubt and ambiguity regarding the aforesaid propositions of law and the provisions of Rule 11(e)(6), Federal Rules of Criminal Procedure, as well as the proper means and circumstances under which the aforesaid rule and propositions of law are to be implemented and applied.

This case manifests what could be described as general confusion by the courts in connection with the circumstances under which Rule 11(e)(6), Federal Rules of Criminal Procedure, and the propositions of law as set forth in Santobello, supra, are to be applied. The significance of the issues raised herein are crystalized and put in their significant prospective by the Panel Opinion of the United States Court of Appeals for the Fifth Circuit, U.S.A. v. Geders, 566 F.2d 1227, 1229, 1230 (1978), which was reversed by an

en banc Opinion of the court, wherein the court stated that:

> "The parties to this appeal have vigorously contested the defendant's contention that the district court erred in permitting the use of plea-related discussions, and clash head-on as to the applicability of Santobello v. New York (404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427)(1971)), United States v. Herman, 544 F.2d 791 (5th Cir. 1977)), and Rule 11 of the Federal Rules of Criminal Procedure, to the facts of this case. When pared to the core, the government's argument is that statements made by the defendant at the meeting in May of 1973 are admissible because the statements were not in connection with or relevant to a plea or an offer to plead guilty, and that no agreement was struck with the defendant prior to the meeting as to the use of statements made by him during the meeting. It is necessary to closely analyze the teachings of Herman and Santobello before assessing the merits of the parties' contentions."

At the request of a United States Customs Officer, after indictment, the defendant met at the United States Attorney's Office with federal law enforcement officials and the Assistant United States Attorney who had presented the facts to the Grand Jury that resulted in the return of the Indictment charging him with the offenses for which he now stands convicted. At the inception of this meeting, the defendant was advised that there would be no discussion about any matters relating to the pending case and that nothing discussed would be used against the defendant. (R. 593-599, 726-728, 758, 764, 767-768)(App. D 1-14).

At the time in question, the defendant had counsel but did not bring his attorney to the meeting. (R. 759, 760)(App. Y 1, 2). Irrespective of the promises made by the government attorney at the meeting in question, during the trial the court denied the defendant's

Motion in Limine made prior to cross-examination and permitted the government to cross-examine the defendant about matters that bore upon his guilt or innocence in this case that were made known to the government by the defendant at the meeting in question. (R. 782-784)(App. U 1-3).

In the case of In the Matter of Joe Doe, 410 F.Supp. 1163 (D.C. Mich. 1976), the court held that once the prosecutor makes a bargain with a defendant that bargain is not only enforceable against the government but must be complied with, and there is no manner or means by virtue of which the government can reject that bargain once it has received any benefit in the form of information or action on the part of the defendant, and they are bound by said bargain. See Brook v. Varick, 243 S.E.2d 841 (S.Ct., W.Va., 1978).

It is obvious that the defendant's purpose for attending the meeting was to either have the pending charges dismissed or his sentence minimized by virtue of a plea bargain, and the government's purpose in having the meeting was to obtain information about the criminal activities that the defendant might be aware of; once again, in exchange for either a dismissal of the charges or a plea bargain limiting the exposure of the defendant to time in jail. In Santobello v. New York, 404 U.S. 257, at 260-262 (1971), this Court recognized that plea bargaining was an essential component of the administration of justice, and that as such, that process must be safeguarded from breach by the prosecutor. The Court compelled strict adherence and compliance with the implicit and explicit terms of plea bargaining even to the extent of the exclusion of

material and relevant evidence. In Santobello, supra, the Court held that:

> " . . . when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be the part of the inducement or consideration, such promise must be fulfilled." (Emphasis added).

In Brady v. U.S., 398 U.S. 742, 755 (1970), this Court declared that a guilty plea induced by misrepresentation, including unfulfilled promises, could not stand. Additionally, fundamental fairness and public confidence in government officials require that prosecutors be held to "meticulous standards of both promises and performance." Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973). Courts have afforded relief to defendants where prosecutors have made specific sentencing promises which were unfulfilled, since sentencing lies totally within the court's discretion. U.S. v. I. H. Hammerman, II, 528 F.2d 326 (4th Cir. 1975); Harris v. Superintendent, Va. State Penitentiary, 518 F.2d 1174 (4th Cir. 1975), even where one federal prosecutor promised immunity from federal prosecution outside his own jurisdiction, U. S. v. Carter, 454 F.2d 426 (4th Cir. 1972), en banc. See also, Geisser v. United States, 513 F.2d 862 (5th Cir. 1975).

The unequivocal and uncontradicted testimony of all the witnesses in connection with the appearance by the defendant at the United States Attorney's Office, before the federal prosecutor, after indictment, was that there was a specific agreement and understanding that there would be no inquiry in any way relating to the

pending indictment and nothing said relating to the pending indictment would be used against the defendant. (R. 741-744, 746, 747) (App. N 1-4, O 1, 2). At the time of the meeting, the defendant had counsel in connection with the pending charges, of which fact all parties were aware, and although the defendant waived counsel for the purpose of discussing matters unrelated to the pending indictment (R. 759, 760)(App. Y 1-2), he at no time waived counsel in regard to discussions in any way bearing upon the pending indictment. The admission in evidence for impeachment or otherwise of statements made relating to the pending indictment not only specifically contravened the agreement of the parties and plea negotiations, but also violated the defendant's Sixth Amendment rights to the presence and effective assistance of counsel during the course of the meeting to the extent that it related to the pending indictment. The Fifth Circuit Court of Appeals, in U. S. v. Daniels, 572 F.2d 535 (5th Cir. 1978), in addressing itself to the totality of the circumstances under which a defendant's statement was obtained by government agents and thereafter used against him, held as follows:

> "We are compelled to comment on Agent Shanks' actions, although they did not affect our decision. Shanks' first interview with the defendant may have come within the ambit of this Court's decision in U. S. v. Vasquez, 476 F.2d 730 (5th Cir. 1973). In Vasquez, the defendant was being held in custody on a state charge of attempted murder. While in custody, the defendant was interviewed by an F.B.I. agent concerning a rife that had been seized in a shooting. This Court held that Vasquez could validly waive his Miranda rights as to an investigation concerning the rifle, though the attempted murder was 'tangentially related' to possession of the rifle, and though the defendant

was represented by counsel on the state charge. The defendant's first statement related only to Shanks' gun investigation. Shanks' second interview with the defendant, however, had at least the facial characteristics of distorting the purpose underlying the holding in Vasquez. Although Agent Shanks purportedly took the second statement only as a part of his investigation concerning the sawed-off shotgun, the second statement contained only one paragraph about the gun incident. The only new information of substance elicited in the second statement concerned the driver's drug related purpose for making the trip. This purpose had no relevance to the gun. It related solely to the drug charges against the defendant. The government may not use Vasquez as a tool to extract statements from a defendant that will strengthen the government's case against him. This Court cannot, and will not, tolerate such prosecutorial misconduct."

In light of all of the foregoing circumstances, it was error of a constitutional dimension for the trial court to permit any inquiry to be made of the defendant regarding his meeting with the officials at the United States Attorney's Office and to permit the former federal prosecutor and others to testify as to any statement made by the defendant as it related to the pending case which they learned during the course of the meeting hereinabove referred to.

In the case of United States v. Herman, 544 F.2d 791 (5th Cir. 1977), the court held that the defendant's statements made during the course of a conversation with a postal inspector in which he sought to have the government drop charges against him in return for his guilty plea to robber charges, was inadmissible, even though the postal inspector had no authority to enter into such plea negotiations. Obviously, the Assistant United States Attorney handling the

prosecution of this case had authority to either dismiss the pending charges against the defendant in exchange for his cooperation in pending investigations or negotiate for a plea of guilty and enter into a plea bargain as it related to the sentencing of the defendant in this case. The question of authority of the prosecutor never comes into play in this case. The court noted that Federal Rule of Criminal Procedure, 11(e)(6) makes inadmissible any statement made "in connection with" any offer to plead guilty or nolo contendre to the charged crime or to any other crime, and that Rule 410, Federal Rules of Evidence, contains exactly the same provision. In discussing the significance of plea bargaining and its use, the court held that plea bargaining must be examined under the doctrine of "caveat prosecutor." (Emphasis added). The court went on to hold that:

> "Even before the enactment of Rule 11(e)(6), we held that plea-related statements are inadmissible, recognizing the inescapable truth that for plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that his statements will later be used against him. In excluding a defendant's plea related statements, Judge Coleman wrote:
>
> > 'If, as the Supreme Court held in Santobello, plea bargaining is an essential component of justice, and, properly administered, is to be encouraged, it is immediately apparent that no defendant or his counsel will pursuch an effort if the remarks uttered during the course of it are to be admitted in evidence as proof of guilt. Moreover, it is inherently unfair for the government to engage in such an activity only to use it as a weapon against the defendant when negotiations fail.'"

The court ultimately concluded that "statements are inadmissible if made at any point during a discussion in which the defendant

seeks to obtain concessions from the government in return for a plea." (Emphasis added).

In rejecting the government's argument that the postal inspector did not have authority to enter into a plea negotiation, the Fifth Circuit Court of Appeals held that "the relevant factor is a defendant's perception of the government official's negotiating authority, not the official's actual authority. The twin goals of encouraging unrestrained plea negotiations and assuring fairness to defendants, dictate that any statements made by a defendant as part of an effort to reach a plea agreement must be excluded; it makes no difference that the defendant's effort is misguided because the official cannot or will not accept the offer."

Unquestionably, all parties attended the meeting with a view in mind of each coming away with some quid pro quo. The defendant was willing to go without his counsel, since he was assured that there would be no discussion relating to the pending case, and with a view in mind of offering information about Mr. Pedro Alvarez and others and their criminal activities in exchange for the dismissal of the charge or a plea of guilty and leniency.

A balanced system of criminal justice should not be made to function in the swampy terrain that has now been created by the en banc Opinion of the Fifth Circuit Court of Appeals from which review is sought, which Opinon totally disregards the purpose of the passage of the provisions of Rule 11(e)(6), Federal Rules of Criminal Procedure. The purpose is to encourage plea bargaining, a system thought by many, though others disagree, to be desirable.

In light of Santobello, supra, care must be taken lest roadblocks be set in the way of easy access to the system of criminal justice that is supposed to be open and even-handedly applied to all persons. This is not a case of a silent hope on the part of a defendant that is not communicated to the law enforcement officials to enhance his position, since it was the law enforcement officials' actions, statements and conduct that initiated the discussion which generated the evidence that resulted in the defendant's convictions. See, A.B.A. Minimum Standards for Criminal Justice Standards Relating to Plea of Guilty, § 340, at 78 (1968).

The position advanced by the defendant herein has been eloquently set forth by the court in the case of United States v. Smith, 525 F.2d 1017 (10th Cir. 1975), where the court, in addressing the same issue, held that:

> "The proceedings during the plea bargaining are generally recognized to be privileged and inadmissible. See, United States v. Ross, 493 F.2d 771, 775 (5th Cir. 1974), wherein it was said:
>
> '[I]t is immediately apparent that no defendant or his counsel will pursue (plea bargaining) if the remarks uttered during the course of it are to be admitted in evidence as proof of guilt.'
>
> "If the proceedings during plea bargaining could be introduced as inculpatory statements against the accused, there would not be very much plea bargaining. So, as a matter of policy, it is essential that it be considered as privileged. Indeed, such lawyers' discussions have always been considered privileged. See, McCormick, Evidence, § 274 (1972 Ed.). See also, Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927), barring use of withdrawn plea of guilty against the defendant.[2] The American Bar Association Standards Relating to Pleas of Guilty recommends that plea discussions and plea agreements are not

to be admissible either for or against the defendant in any proceeding. 1968 Approved Draft, § 3.4, states:

> 'Unless the defendant subsequently enters a plea of guilty or nolo contendre which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement, should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.'

> "There are state decisions which recognize that plea discussions are not admissible into evidence. See, State v. Byrd, 203 Kan. 45, 453 P.2d 22 (1969) (dictum). See also, People v. Hamilton, 60 Cal.2d 105, 32 Cal.Rptr., 383 P.2d 412 (1963).

> "Also, the Second Circuit, in the course of interpreting New York law, has stated that discussions during plea bargaining are not admissible. See, United States ex rel. Burke v. Mancusi, 425 F.2d 1061, 1062, n.2, 1063 (2d Cir. 1970)(habeas corpus proceedings).

> "The Supreme Court in Santobello v. New York, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), recognized the efficacy of plea bargaining as a necessary part of the criminal procedure.

> "We do not argue either in favor or against plea bargaining in considering the present question except to state that if it is to be carried on, the discussions cannot be admissible in evidence, for to permit this would effectively thwart the effort."

The court ultimately concluded that the defendant, in light of this Court's opinion in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), had a right to make his own defense and therefore could individually engage in plea bargaining efforts to which the provisions of Rule 11(e)(6), Federal Rules of Criminal Procedure, would apply.

The testimony of the federal investigator in charge of this case, Lowell Miller, presented to the government out of the presence of the jury initially, and thereafter in the presence of the jury, and the cross-examination of said government offical in the presence of the jury, fully support the defendant's contentions herein. Mr. Miller advised the court that he has a policy of advising defendants that if they were to cooperate, that cooperation would be made known to the prosecutor and, in turn, to the sentencing court. (R. 7620768)(App. Z 1-7). Mr. Miller also testified, and it is the only rational explanation for Mr. Geders to have met with him and the prosecutor, that Mr. Geders attended the meeting because he wanted "to help himself in this case" and he also had a falling-out with Mr. Alvarez. (R. 768, 769)(App. T 23)(Emphasis added). It is interesting that Mr. Miller could no- recall what he said to Mr. Geders after Mr. Geders told him that he want to cooperate with the federal officials and provide them with certain information in order to help himself in the pending matter. (R. 769)(App. T 3).

Over objection, Charles Hudson, an investigator for the United States Treasury Department, Bureau of Alcohol, Tobacco Tax & Firearms, and Oscar Blasingame, who at all material times was an Assistant United States Attorney, testified to facts and statements made to them in the meeting at the United States Attorney's Office previously discussed, all of which evidence violated the agreement of the parties and the authorities hereinabove set out, and the admission of which was highly prejudicial and constituted reversible error.

The en banc Opinion of the Fifth Circuit Court of Appeals relating to the application of Rule 11(e)(6), Federal Rules of Criminal Procedure, and Rule 410 of the Federal Rules of Evidence, creates a conflict within the circuits, and specifically a conflict between the authorities heretofore cited in the Second and Tenth Circuits, and the present position of the Fifth Circuit Court of Appeals as set forth in the en banc Opinion, and further constitutes an improper and unwarranted interpretation and application of the aforesaid rules. The criteria to be followed by the courts of this land in connection with the application of the aforesaid rules is best stated in the Panel Opinion in Geders, supra, at 1230, where the court held that:

> "The Court further stated that whether statements are made during the plea bargaining process according to hypertechnical distinctions, and that the defendant need not accompany all admissions with 'a preamble explicitely demarcating the beginning of plea discussions.' Id., at 797.
>
> "As Judge Goldberg so apply stated, "if Congress wanted plea bargaining to be formalized, ritualized, or structural, the rules could have so provided, but Congress, believing that plea bargaining is a necessary ingredient in criminal prosecutions of the magnitude we face, wanted an accused freely to discuss his or her plight, the probability of punishment, and the possible range thereof. Having embraked onthe plea bargaining route, Congress did not intent the accused to be convicted by the bargaining words Congress had encouraged him or her to utter. We cannot ascribe to Congress any intention to sandbag an accused in his or her plea bargaining sessions. The government, as one of the dancing partners, should not be able to lead its partner to a trap door on the dance floor.' Id, at 797, 798.

> "The rationale supporting a liberal interpretation of when plea bargaining commences is justified by the desire to encourage free and candid discussion between the government and the accused and to prevent plea bargaining from being used as a trap for the unwary."

The inability of a majority of the appellate court judges inthe en banc Opinion to determine the applicability of the principles announced by this Court in Santobello, supra, in light of Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); and Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), requires that this Court grant the Petition in order to obtain a clear understanding and application of the principles of law set out in the aforesaid opinions of this Court.

CONCLUSION

As previously set forth in this Petition, Petitioner respectfully submits that the decision and opinion of the Fifth Circuit Court of Appeals en banc in this case raises important questions affecting the administration of criminal law in the United States, and therefore Petitioner respectfully urges this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit so these issues may be more fully examined through briefs and argument and receive the benefit of this Court's judgment and final resolution.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been furnished, by mail, to the United States Attorney's Office for the Middle District of Florida, Post Office Box 2841, Tampa, Florida 33601; Wade McCree, Jr., Solicitor General of the United States of America, Department of Justice, Washington, D. C.; and to Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, Louisiana 70130, this 9th day of February, 1979.

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ATTORNEY